

A Anthony Kulanthai Marie Joseph (suing as the representative of the estate of Martin Raj a/l Anthony Selvaraj, deceased) v Malaysian Assurance Alliance Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-815 OF 2004
ABDULL HAMID EMBONG, KN SEGARA AND ABU SAMAH JJCA
21 NOVEMBER 2007

C *Civil Procedure — Limitation of action — Trustee — Action by beneficiary to recover trust property held by trustee — Whether any period of limitation would apply — Limitation Act 1953 s 22(1)(b)*

D *Insurance — Life insurance — Trust of life policy — Action by beneficiary wife to recover sum secured by policy — Whether action founded on contract or on trust — Whether action time-barred — Civil Law Act 1956 s 23(1) — Limitation Act 1953 s 22(1)(b)*

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F *Limitation — Trust — Trust property — Moneys under life insurance policy — Action by wife to recover sum secured by policy — Whether action founded on contract or on trust — Whether action time-barred — Civil Law Act 1956 s 23(1) — Limitation Act 1953 s 22(1)(b)*

G *Trusts and Trustees — Trust property — Moneys under life insurance policy — Trust of life policy in favour of wife — Action by wife to recover sum secured by policy — Whether action founded on contract or on trust — Whether action time-barred — Whether insurance company declared itself trustee of policy — Civil Law Act 1956 s 23(1) — Limitation Act 1953 s 22(1)(b)*

H The insured held a life policy of insurance in favour of his wife. He died on 2 March 1993. When his wife attempted to claim the insurance moneys, the insurer refused to admit the policy on the basis that the policy had lapsed due to the insured's failure to pay his premiums as stipulated under the policy.

I Whilst it was clear that the insured had failed to pay his premiums as scheduled under the policy, he did pay make the payments, sometimes within certain 'grace periods', at other times outside the 'grace periods'. However, all payments were received unconditionally by the insurer. The wife applied to the High Court for several declarations, inter alia, to the effect that the policy

was valid and subsisting at the time of her husband's death and that the insurer was holding the moneys payable under the policy in trust for her. The insurer denied the wife's claim on the following grounds: (a) that the relevant insurance policy had lapsed owing to the insured's failure to pay his premium at the time prescribed under the terms of the policy; and (b) that the wife's action was time barred by virtue of the Limitation Act 1953 ('LA'). The High Court judge found in favour of the insurer on both grounds and dismissed the wife's claim. The wife thus appealed to the Court of Appeal. At the outset of the appeal, the insurer conceded that the policy of insurance had not lapsed at the time of death of the insured. Thus, the Court of Appeal had to only decide whether the wife's action had been time barred under the LA.

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Held, allowing the appeal with costs in the court below:

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- (1) The High Court judge had seriously misdirected himself on the facts and the law when he held that the wife's claim was founded on contract, and was accordingly time barred when her originating summons, dated 4 June 2003, was filed in court more than six years after the date of death of her husband. The learned judge had his mind erroneously focused on s 6(1)(a) of the LA. He erred in failing to consider that the claim of the wife was, in fact and in law, a claim by her as a beneficiary (*'cestui que trust'*) of a policy effected under s 23(1) of the Civil Law Act 1956 ('CLA') creating a trust of the said policy of assurance immediately upon such a policy being effected (see para 14–15).
- (2) In the instant case, the trust property (the moneys under the policy) remained in the hands of the insurer as a bare trustee right from the date of death of the insured. Any action to recover the sum secured by the policy in the hands of the insurer as bare trustee, by the *cestui que trust* and/or personal representative of the insured, would not constitute an action founded on contract. Further, it was clear, looking at the documents that formed part of the insurance policy, that the insurer for all intents and purposes, had declared itself a trustee of the policy (see paras 16–17).
- (3) As trustee, the insurer was under an obligation to pay the insurance moneys (trust property) to the beneficiary (wife) upon the death of the insured. On the trustee's (insurer's) failure to do so, any action instituted by the beneficiary (wife) would not be a claim in contract but a claim by the beneficiary (wife) under the trust to recover from the trustee (insurer) trust property, in the possession of the trustee. No period of limitation prescribed by the LA would apply to such an action by the beneficiary, consonant with the provisions of s 22(1)(b) of the LA (see para 19).

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- A (4) It would be inequitable, unconscionable and a gross injustice to allow the insurer to extinguish the right of the *cestui que* trust of a s 23 of the CLA policy of insurance, by invoking the purported limitation, when none existed (see para 20).

B [Bahasa Malaysia summary]

- C Pengambil insurans memegang insurans polisi hayat bagi pihak isterinya. Dia telah meninggal dunia pada 2 Mac 1993. Apabila isterinya cuba menuntut wang insurans, syarikat insurans enggan mengakui polisi itu atas dasar bahawa polisi itu telah luput akibat kegagalan pengambil insurans membayar premium-premiumnya sepertimana yang ditetapkan di bawah polisi itu. Walaupun ia adalah jelas bahawa pengambil insurans telah gagal untuk membayar premium-premiumnya sepertimana yang dijadualkan di bawah polisi itu, dia telah membuat bayaran-bayaran tersebut dalam tempoh 'grace periods', dan pada masa lain di luar 'grace periods' tersebut. Walau bagaimanapun, kesemua bayaran telah diterima tanpa syarat oleh syarikat insurans. Si isteri telah memohon ke Mahkamah Tinggi untuk beberapa deklaras, antara lain, agar dikuatkuasakan bahawa polisi itu adalah sah dan wujud pada masa kematian suaminya dan bahawa syarikat insurans memegang wang yang perlu dibayar di bawah polisi itu dalam amanah untuknya. Syarikat insurans menafikan tuntutan si isteri atas alasan-alasan berikut: (a) bahawa polisi insurans berkaitan telah luput masa akibat kegagalan pengambil insurans membayar premiumnya pada masa yang ditetapkan di bawah terma-terma polisi itu; dan (b) bahawa tindakan si isteri telah luput had masa menurut Akta Had Masa 1953 ('AHM'). Hakim Mahkamah Tinggi memutuskan memihak kepada syarikat insurans atas kedua-dua alasan dan telah menolak tuntutan si isteri. Si isteri oleh itu telah merayu ke Mahkamah Rayuan. Pada permulaan rayuan tersebut, syarikat insurans mengaku bahawa polisi insurans itu tidak luput pada masa kematian pengambil insurans. Oleh itu, Mahkamah Rayuan hanya perlu memutuskan sama ada tindakan si isteri telah luput had masa di bawah AHM.

H **Diputuskan**, membenarkan rayuan dengan kos di Mahkamah Tinggi:

- I (1) Hakim Mahkamah Tinggi telah salah arah atas fakta dan undang-undang apabila beliau memutuskan bahawa tuntutan si isteri adalah berasaskan kontrak, dan telahpun luput had masa apabila saman pemulanya, bertarikh 4 Jun 2003, difailkan di mahkamah lebih enam tahun selepas tarikh kematian suaminya. Hakim yang bijaksana dalam pemikirannya terkhilaf kerana bertumpu kepada s 6(1) AHM. Beliau terkhilaf kerana gagal mempertimbangkan bahawa tuntutan si isteri adalah, dalam fakta dan undang-undang, suatu tuntutan olehnya sebagai benefisiari (amanah *cestui que*) untuk polisi yang

- dikuatkuasakan di bawah s 23(1) Akta Undang-Undang Sivil 1956 ('AUUS') yang membentuk amanah untuk polisi jaminan tersebut sejurus selepas polisi sedemikian dikuatkuasakan (lihat perenggan 14–15). A
- (2) Dalam kes ini, harta amanah (wang di bawah polisi itu) kekal dalam pegangan syarikat insurans sebagai pemegang amanah sahaja dari tarikh kematian pengambil insurans. Apa-apa tindakan untuk mendapat balik jumlah wang yang diperolehi oleh polisi itu dalam pegangan syarikat insurans sebagai pemegang amanah sahaja, oleh amanah *cestui que* dan/atau representasi peribadi pengambil insurans, tidak membentuk tindakan yang berasaskan kontrak. Tambahan pula, ia adalah jelas melihat kepada dokumen-dokumen yang membentuk sebahagian polisi insurans, bahawa syarikat insurans untuk apa-apa niat dan tujuan, telah mengisytiharkannya pemegang amanah polisi itu (lihat perenggan 16–17). B C D
- (3) Sebagai pemegang amanah, syarikat insurans adalah di bawah obligasi untuk membayar wang insurans itu (harta amanah) kepada benefisiari (isteri) selepas kematian pengambil insurans. Atas kegagalan pemegang amanah (syarikat insurans) untuk berbuat demikian, apa-apa tindakan oleh benefisiari (isteri) tidak akan merupakan tuntutan dalam kontrak tetapi suatu tuntutan oleh benefisiari (isteri) di bawah amanah untuk mendapat balik daripada pemegang amanah (syarikat insurans) harta amanah, dalam milikan pemegang amanah. Tiada tempoh had masa ditetapkan oleh AHM yang terpakai dalam tindakan sedemikian oleh benefisiari, sejajar dengan peruntukan s 22(1)(b) AHM (lihat perenggan 19). E F
- (4) Adalah tidak saksama, tidak berpatutan dan tidak adil untuk membenarkan syarikat insurans melupuskan hak untuk amanah *cestui que* dalam polisi insurans s 23 AUUS, dengan mengenakan had masa yang dimaksudkan, apabila ia tidak wujud (lihat perenggan 20).] G

Notes

For a case on trustee, limitation of action, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4663.

For cases on money under life insurance policy under trust property generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2497–2510. H

For cases on trust of life policy, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 179–183.

For cases on trust property under trust generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2471–2481. I

Legislation referred to

Civil Law Act 1956 s 23, 23(1)

Limitation Act 1953 ss 6(1)(a), 22(1)(b)

A **Appeal from:** Originating Summons No S2–24–992 of 2003 (High Court, Kuala Lumpur)

Murali Achan (K Kulasekar with him) (K Kulasekar Achan & Associates) for the appellant.

B *Ho Kee Tong (Gan, Ho & Razlan Hadri) for the respondent.*

KN Segara JCA (delivering judgment of the court):

C [1] Martin Raj a/l Anthony Selvaraj applied for a life insurance on his own life for the sum of RM50,000 in a plan of insurance called Executive Master Plan with Malaysian Assurance Alliance Bhd ('MAAB') on 10 June 1992. In his proposal form he named his wife Anthony Kulanthai Marie Joseph as his beneficiary. On 12 June 1992 ('policy date') MAAB issued Policy No M922849094 ('policy') to the insured Martin Raj a/l Anthony Selvaraj with
D the maturity date/expiry date on 12 June 2052. On the policy information page the applicant/owner was expressed as Martin Raj a/l Anthony Selvaraj and the face amount was RM50,000. The total first monthly premium was RM166.53.

E [2] Premiums are payable on the policy date and every one month thereafter during the lifetime of the insured, as provided in the 'Schedule of Benefits and Premiums' of the policy information page (p 78 of the *rekod rayuan*).

F [3] Endorsement 1 of the policy reads, inter alia:

G (a) This Policy is effected under 's 23 of the Civil Law Ordinance of the Federation of Malaya' for the benefit of the beneficiary/beneficiaries as stated in the Application Form.

The insured hereby appoints himself or herself or the Trustees as stated in the 'Appointment of Trustees' Form to be Trustees of all money payable hereunder.

H (b) It is hereby agreed that the provisions of this Policy under 'Ownership Provisions' be cancelled in its entirety and shall be substituted by the following:

I All rights, privileges and options under this contract shall be reserved to the Trustees alone.

[4] The relevant provisions of the said sections of the Civil Law Act 1956 ('the CLA') reads:

23(1)A A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or... shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not as long as any object of the trust remains unperformed form part of the estate of the insured...

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(3) *The insured may by the policy* or any memorandum under his or her hand appoint a trustee or trustees *of the moneys payable under the policy*, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

B

(4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

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(Emphasis added.)

[5] There is no dispute that the policy of assurance M922849094 effected by Martin Raj a/l Anthony Selvaraj (insured) on his own life and expressed to be for the benefit of his wife Anthony Kolanthai Marie Joseph was a policy of assurance falling squarely under s 23(1) of the CLA which created a statutory trust in favour of the wife (*'cestui que trust'*).

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[6] The insured died on 2 March 1993 as a result of a 'myocardial infraction'. By letter dated 24 July 1995 MAAB wrote to the solicitors, Messrs Ganaendrah & Associates, that no claim can be admitted on the policy as the policy taken out on 12 June 1992 had lapsed on 12 January 1993 as the '1st year 8th monthly premium of RM166.53 had not been remitted to us'. There was no evidence that the insured had been notified by MAAB that the policy had lapsed at any time before his death on 2 March 1993. Upon being informed that no claim could be admitted on the policy on the purported ground that it had lapsed on 12 January 1993, the wife caused investigations to be made and based on the payment history on the policy, supplied by computer print out, the last installment payment received by MAAB was on 2 February 1993. The payment history revealed as follows:

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Payment Dates	Due Dates
(a) 1 August 1992	12 August 1992
(b) 1 October 1992	12 September 1992
(c) 24 October 1992	12 October 1992
(d) 24 December 1992	12 November 1992
(e) 2 February 1993	12 December 1992

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[7] The policy, under the premium provisions in respect of payment of premiums and grace period, provides, inter alia, as follows:

- A** *Default* — After payment of the first premium, failure to pay a premium on or before its due date to the Company will constitute a default in payment of the premium.
- B** *Grace Period* — A Grace Period of thirty-one days from its due date will be allowed for payment of each premium after the first during which period this Policy will remain in force. If any premium remains unpaid at the end of its Grace Period, the Policy shall lapse and have no further value except as may be provided under the NON-FORFEITURE PROVISIONS.
- C** *Deduction of Premiums at Death* — If this Policy becomes a claim by death of the insured, any unpaid balance of the premiums due for the full Policy Year in which death occurs shall be deducted from the proceeds payable under the Policy.

- D** [8] Looking at the payment history above, it would appear that there was a failure by the insured to pay the premium on the due dates for the months of September, October, November and December 1992. The payment of the premium for the month of August 1992 was paid earlier than the due date of '12 August 1992' as it was paid on 1 August 1992. Nevertheless, in respect of the payment of the premium for the month of September 1992 and October 1992, it was paid within the 'grace period'. The policy therefore
- E** remained in force until the next premium due on 12 November 1992 *plus* another 31 days (for the 'grace period'). However, the premium for the month of November 1992 paid on 24 December 1992 was clearly paid out of the 'grace period'. The said premium ought not to have been received as the policy had lapsed. Nevertheless, since the said premium was received
- F** unconditionally, the policy must remain in force on 24 December 1992. The next payment was made on 2 February 1993. Again, this payment was accepted unconditionally. Since it was accepted unconditionally it follows that MAAB has acknowledged, unequivocally, that the policy remained in force as at 2 February 1993.

- G** [9] MAAB, by accepting the payment of the premiums after the due date plus the grace period, in December 1992 and February 1993, had clearly waived the requirement of strict adherence to the payment terms, in particular, the terms as to the intervals within which payment of the premium
- H** is to be made. It is settled law, that acceptance of performance of a contract outside the time prescribed in the contract, renders time no longer to be the essence of the contract. Since MAAB accepted the premium outside the grace period, time was no longer the essence of the contract. If MAAB wished to insist on the payment of premium within a period of time, then it ought to
- I** have given notice to the insured to reinstate time to be of the essence of the contract, after it had received the payment on 2 February 1993 from the insured. Since MAAB had by its conduct implicitly *elected* not to make *time the essence* of the contract at any period *between 2 February 1993 and the date of death* of the insured on 2 March 1993 and call for payment *all outstanding*

premiums as at 2 February 1993, then MAAB's option would clearly be to exercise its rights, in the event the policy becomes a claim by death, under the provisions of the policy which reads:

Deduction of Premiums at Death — If this Policy becomes a claim by death of the insured, any unpaid balance of the premiums due for the full Policy Year in which death occurs shall be deducted from the proceeds payable under the Policy.

[10] It is inequitable for MAAB to accept premium payments unconditionally from the insured during his lifetime, and then after the death of the insured attempt to avoid the policy by contending the policy had lapsed, at the date of death, on the ground that the insured had defaulted in payment of a premium on or before its due date plus 31 days (grace period). In the above circumstances, the wife of the deceased insured (plaintiff) applied to the High Court by originating summons dated 4 April 2003 seeking the following declaration and orders:

- (a) a declaration that the policy of life insurance No 9228490094 taken out by Martin Raj a/l Anthony Selvaraj, the insured, was valid as at 2 March 1993;
- (b) a declaration that MAAB (defendant) is holding moneys payable under the insurance policy in trust for the plaintiff;
- (c) an order that the defendant do pay all moneys payable under the policy to the plaintiff.

[11] The defendant denied the plaintiff's claim on the following grounds:

- (a) that the relevant insurance policy had lapsed owing to the insured's failure to pay his premium at the time prescribed under the terms of the policy;
- (b) that the plaintiff's action is time barred by virtue of the Limitation Act 1953 ('the LA').

[12] The learned High Court judge found in favour of the defendant on both grounds and dismissed the plaintiff's originating summons and hence this present appeal before us by the plaintiff. For convenience, the appellant and respondent before us shall be referred to as, the plaintiff and defendant, respectively, in this judgment.

[13] At the very outset of this appeal, counsel for the defendant conceded that the policy of insurance had not lapsed at the date of death of the insured. Therefore, there was only one issue to be determined by this court, namely, whether the plaintiff's action had been time barred under the LA. In this regard, the learned High Court judge held in his grounds of judgment:

- A Alasan utama saya menolak tuntutan plaintif itu ialah oleh sebab tindakan plaintif ini dimulakan selepas enam tahun dari tarikh kematian si mati iaitu tarikh bermulanya kausa tindakan ini. Si mati meninggal dunia pada 2 Mac 1993. Tindakan plaintif ini difailkan di mahkamah pada 16 Julai 2004 lebih dari 11 tahun. Polisi insurans yang dibuat oleh si mati dengan defendan adalah
- B merupakan satu jenis kontrak. Had masa untuk mengambil tindakan terhadap apa-apa kontrak ialah dalam masa enam tahun. Di dalam tindakan ini tindakan plaintif dibuat lebih dari 11 tahun. Tidak ada apa-apa alasan diberi oleh plaintif mengapa kelewatan dilakukan untuk memulakan tindakan. Di atas alasan ini sahaja tindakan plaintif wajar ditolak.
- C [14] The learned High Court judge has seriously misdirected himself on the facts and the law when he held that the claim of the plaintiff was founded on contract, and was accordingly time barred when her originating summons, dated 4 April 2003, was filed in court more than six years after the date of
- D death of her husband. The learned judge had his mind focused on s 6(1)(a) of the LA. He fell seriously in error in assuming the claim was an action founded on a contract. Section 6(1)(a) of the LA provides:
- E Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
- (a) actions founded on a contract or on tort; ...
- F [15] He erred in failing to consider that the claim of the wife was, in fact and in law, a claim by her as a beneficiary (*cestui que* trust) of a policy effected under s 23(1) of the CLA creating a trust of the said policy of assurance immediately upon such a policy is effected.
- G [16] In this case, upon the death of the insured, the trust property (the sum secured by the policy) was never at any time handed over by the defendant to a trustee or trustees duly appointed under the provisions of s 23 of the CLA or in default of such appointment, to the legal personal representative. In such circumstances, in law and in fact, the trust property (the sum secured
- H by the policy) remained in the hands of the defendant as a bare trustee right from the date of death of the insured. On the particular facts of this case, any action to recover the sum secured by the policy in the hands of the defendant as bare trustee, by the *cestui que* trust and/or personal representative of the insured, is not an action founded on contract.
- I [17] The factual matrix of this case can also be looked at from another perspective. The defendant, for all intents and purposes, had declared itself a trustee of the policy. This is patent from a document that formed part of the insurance policy documents. The document was signed by both, the

Chairman, as well as the General Manager/Registrar of the defendant (p 77 of the *rekod rayuan*). The document contains the following declaration: A

MALAYSIAN ASSURANCE ALLIANCE BERHAD will pay upon surrender of this Policy and subject to its provision,

- (1) The Face Amount to the Owner if the Insured is then alive on the Maturity Date. B
- (2) The Face Amount to the Beneficiary upon the death of the Insured prior to the 'Maturity Date' provided that due proof of such death is furnished in form specified by the Company. C

MALAYSIAN ASSURANCE ALLIANCE BERHAD has caused this Policy to be issued on the Issue Date.

[18] This declaration was obviously made with the consent of the insured. It would appear that this very document is also evidence that the insured had appointed a trustee (that is, the defendant) consistent with s 23(2) of the CLA which reads: D

The insured may by the policy ... appoint a trustee... of the moneys payable under the policy ... E

[19] The insured, having accepted the defendant's declaration to pay the insurance moneys directly to the beneficiary, upon the death of the insured prior to the maturity date, the insured must be deemed unequivocally to have appointed the defendant as trustee. Such trustee would then be under an obligation to pay the insurance moneys (trust property) to the beneficiary upon the death of the insured. If the said trustee fails to do so, any action instituted by the beneficiary would not be a claim in contract but a claim by the beneficiary under the trust to recover from the trustee trust property, in the possession of the trustee. Under such circumstances, no period of limitation prescribed by the LA shall apply to the said action by the beneficiary, consonant with the provisions of s 22(1)(b) of the LA which reads: F G

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action — H

(a) ...

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee ... I

[20] The plaintiff, in her capacity as the legal personal representative of the insured, as well as the *cestui que* trust of the policy pursuant to the provisions

A of s 23 of the CLA, had no alternative but to file the originating summons seeking the declarations and orders set out therein. It would be inequitable, unconscionable and a gross injustice to allow the defendant to extinguish the right of the *cestui que* trust of a s 23 of the CLA policy of insurance, by invoking the purported limitation, when none exists.

B [21] In the above circumstances, we are unanimous that this appeal is allowed in terms of prayer (a), (b) and (c) of the originating summons dated 4 April 2003, that is:

- C (a) Suatu deklarasi bahawa polisi insurans seumur hidup No M922849094 yang diambil oleh Martin Raj a/l Anthony Selavaraj, si mati, adalah sah pada 2 Mac 1993.
- D (b) Suatu deklarasi bahawa defendan memegang jumlah yang kena dibayar di bawah polisi insurans tersebut sebagai amanah bagi pihak estet si mati dan/atau plaintif.
- E (c) Defendan membayar plaintif jumlah yang kena dibayar di bawah polisi insurans tersebut kepada plaintif bersama dengan faedah pada kadar 8% dari 2 Mac 1993 sehingga pembayaran penuh.

[22] The plaintiff shall be entitled to the costs in the court below. By consent the costs of the appeal to the plaintiff in the Court of Appeal is agreed at RM5,000. The deposit shall be refunded to the appellant.

F *Appeal allowed with costs in the court below.*

Reported by Andrew Christopher Simon

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